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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of KATHERINE and
RALPH COVELL.

COUNTY OF SAN DIEGO, et. al.

Respondents,

v.

RALPH COVELL,

Appellant.

D043650

(Super. Ct. No. DF130134)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia Garcia, Judge. Affirmed.

Ralph Covell appeals from a judgment increasing the amount of his child support obligation to his former spouse. The child support order was based on an imputed

income calculation derived from the methodology set forth in *In re Marriage of Destein* (2001) 91 Cal.App.4th 1385. We affirm the judgment.¹

FACTUAL AND PROCEDURAL BACKGROUND

Ralph and Katherine Covell were divorced in December 1994. Effective January 1995, Ralph was ordered to pay \$900 monthly child support for their two children. In December 2001, Katherine filed a motion to modify child support, contending that Ralph's monthly income was at least \$25,000. To support her claim, she cited several real property transactions engaged in by Ralph in 2000 showing that he had substantial wealth available for support. The County of San Diego joined in the child support proceedings under Family Code section 17406 to represent the public interest.

As we shall delineate below, the trial court found that Ralph was not a typical income earner but rather accumulated wealth through complex real estate transactions. Accordingly, the court determined an alternative method of income calculation was necessary. The court selected the methodology approved of in *In re Marriage of Destein*, *supra*, 91 Cal.App.4th 1385, which calculates imputed income by valuing non-income-producing investment assets, and then applying a rate of return to those assets. After valuing Ralph's assets and applying a rate of return, the court imputed \$8,843 monthly income to Ralph and increased his monthly child support obligation to \$2,485. Ralph contends the trial court's award is not supported by the record.

¹ Ralph's December 2, 2004 unopposed motion to augment the record is granted.

A. *Financial Information Provided by Forensic Accountant Experts*

1. *Overview*

Based on the indications that Ralph was not a typical income earner but rather engaged in sophisticated real estate transactions to generate wealth, the court—with Ralph's and Katherine's agreement—appointed accountant Karen Kaseno to serve as a special master to evaluate Ralph's financial investments. Kaseno summarized her evaluation of Ralph's complex real estate and business interests in a lengthy August 2003 report. Ralph retained accountant Alvin Golden to review Kaseno's report.

Kaseno and Golden reviewed Ralph's real estate and business transactions occurring in the late 1990's and early 2000's, which included sales and purchases of real property and acquisition of business ownership interests.² Kaseno ascertained that Ralph's investment strategies included acquiring adjacent lands and combining the properties for greater value and buying land in growing areas of development. She opined that he had made several lucrative real estate investments in the past and it appeared he may still be involved in potentially lucrative activities. In contrast, Golden concluded Ralph had a negative income and was living off loans secured by his real estate.

Kaseno presented two different methodologies for computing Ralph's imputed income, including the *Destein* method of applying a rate of return to the value of non-

² Ralph was in reorganization bankruptcy from 1996 to 2000. Some of his transactions were conducted under the auspices of the bankruptcy court.

income-producing investment assets, and an alternative method of comparing the difference in net worth over a period of time. After reviewing the information provided by the parties and the experts, the court selected the *Destein* method. The court imputed income to Ralph based on a rate of return applied to the value of his currently-owned assets, including two businesses (San Gabriel Canyon Ranch Corporation and Westridge Financial Services) and several parcels of real property (one property in Mesquite, Nevada, and two in Cambria, California). The experts agreed on the value of the two businesses and one of the Cambria properties, but disagreed on the value of the Mesquite property and the other Cambria property. They also disagreed on how Ralph's imputed income should be calculated under the *Destein* method. As to asset valuation, the court adopted the valuations used by Ralph's expert, Golden, for all of Ralph's assets, except the Mesquite property. As to calculating income, the court adopted Golden's calculations except it declined to use certain debt service reductions recommended by Golden.

We summarize the information presented to the trial court.

2. Sales of Real Property

Sometime between 1998 and 2000, Ralph sold two properties, one in Pasadena and one in Asuza (where he resided). Ralph's net proceeds from the sale of the Pasadena property were between \$21,000 and \$30,000. His net proceeds from the Asuza transaction were approximately \$3,421,325. The Asuza transaction included an agreement whereby Ralph provided consulting services to the seller regarding the "entitlement process for the property" for a \$35,000 fee.

The court ultimately did not use the profits from these sales to impute income, but they were part of the evidentiary presentation considered by the court when deciding whether it was appropriate to impute income to Ralph.

3. *Ralph's Currently-Owned Business and Real Estate Assets*

(a) *San Gabriel Canyon Ranch Corporation*: Ralph owns 100 percent of the San Gabriel Canyon Ranch Corporation. The corporation runs a Clydesdale horse breeding business on Ralph's Cambria ranch. Tax documents indicate the ranch operates at a loss and no income is generated from the corporation. However, the approximately 50 Clydesdale horses have value, estimated by Ralph and Katherine to be about \$5,000 per horse. Based on the value of the horses, Kaseno opined the value of the corporation was about \$250,000. However, in their *Destein* imputed income calculations, both Kaseno and Golden adopted Ralph's estimation that the corporation was worth about \$180,000.

(b) *Cambria ranch property*: In 2000, Ralph acquired the 1,450-acre Cambria ranch (where he currently resides) for \$4.5 million. Coincident with the purchase transaction, the Nature Conservancy paid \$4,066,500 for a conservation easement for all but 5.5 acres of the ranch. The terms of the easement allow Ralph to keep the 5.5 acres for his own use, to develop at least five homes on the property, and to use the remaining acreage subject to certain restrictions.

Golden opined that as of 2003 the Cambria ranch property was worth about \$1.2 million. Golden explained that this assessment was based on conversations between Ralph and knowledgeable real estate professionals, who valued the five parcels retained for Ralph's personal use at approximately \$200,000 each. Kaseno believed the value was

higher given that Ralph could develop homes on the property and had access to all the acreage with some restrictions. Golden rejected this, noting that under the terms of the easement Ralph could not divert water to develop the other parcels.

Kaseno recommended that an independent appraiser (i.e., appointed by the court and/or agreed to by the parties) be hired to ascertain the value of the Cambria ranch. In the absence of an independent appraisal, Kaseno valued the Cambria ranch at \$2.7 million, reducing its value below the purchase price by 40 percent to account for the Nature Conservancy's easement.

In 2002, Ralph executed notes totaling \$250,000 secured by the Cambria ranch property.

(c) *California Cotton ranch property (Cambria)*: In January 2001, Ralph purchased an additional three parcels (190 acres) adjacent to the Cambria ranch from California Cotton Sales for \$1.2 million. Golden and Kaseno agreed that the value of the California Cotton ranch property in 2003 was \$1,306,000.

(d) *Mesquite, Nevada property*: In 2000, Ralph purchased 13.76 acres of land from RC Devco, Inc. for \$5.5 million, executing a promissory note for \$2.6 million in favor of RC Devco. Based on an agreement whereby RC Devco paid Ralph a monthly sum for an option to repurchase the property, Ralph received a net amount of \$19,334 per month from this transaction until March 2002. In January 2003, Ralph borrowed \$950,000 using the Mesquite property as collateral and invested the money in Westridge Financial Services, a company in which Ralph is a 50 percent owner.

Based on a December 2002 lender appraisal, Golden valued the Mesquite property at \$1.9 million in 2003.³ Ralph also submitted an October 2002 lender appraisal valuing the property at \$1,883,000. The October 2002 appraisal states its purpose was for mortgage lending purposes and not for any other use. Again, Kaseno recommended that an independent appraiser be hired to determine the fair market value of the property. No independent appraisals were obtained prior to the court's hearing and ruling on the modification motion.

In the absence of an independent appraisal, Kaseno valued the Mesquite property at its purchase price of \$5.5 million. For both the Cambria ranch and Mesquite properties, Kaseno opined that use of the purchase price was a conservative assumption because the properties had probably increased in value since their purchase. She acknowledged she was not an expert in appraisals, but stated her research revealed property values were not depreciating in these areas.

(e) *Westridge Financial Services*: Ralph is 50 percent owner of Westridge Financial Services, which was started in January 2003 and in which Ralph invested \$950,000 cash (taken from the loan secured by the Mesquite property). Kaseno was unable to determine the financial condition of this company, but she opined that Ralph's investment should be included in the imputed income computation. In their computations, both Kaseno and Golden valued this company at \$950,000.

³ This December 2002 appraisal was apparently not submitted into evidence.

B. Experts' Calculations of Ralph's Imputed Income

1. Kaseno's Calculations

As we set forth above, in her *Destein* imputed income calculations, Kaseno valued the Mesquite property at \$5.5 million, the Cambria ranch at \$2.7 million, the California Cotton ranch at \$1,306,000, Westridge Financial Services at \$950,000, and San Gabriel Canyon Ranch Corporation at \$180,000. After subtracting Ralph's various mortgages and other liabilities, she calculated that the current net value of Ralph's assets as of August 2003 was \$4,994,325. Based on this \$4,994,325 net value, and using an annual rate of return between 2 and 6 percent, Kaseno calculated that Ralph's imputed income was \$99,800 to \$299,640 per year (\$8,317 to \$24,970 monthly).⁴

2. Golden's Calculations

In his *Destein* calculations, Golden used the same valuations as Kaseno for the California Cotton ranch, Westridge Financial Services, and San Gabriel Canyon Ranch Corporation. However, Golden asserted Kaseno had improperly disregarded recent lender appraisals for the Mesquite property and the information that the Cambria ranch operates at a loss. Golden valued the Mesquite property at \$1.9 million (rather than Kaseno's \$5.5 million) and valued the Cambria ranch at \$1.2 million (rather than Kaseno's \$2.7 million). He also added \$2.6 million for an asset entitled "RC Devco," which apparently referred to RC Devco, Inc.'s option to repurchase the Mesquite

⁴ Kaseno stated that a 6 percent rate of return was high in the present economic climate, and that a risk-free rate of return was between 2 to 4 percent.

property. After subtracting mortgages and other liabilities, Golden determined that the net value of Ralph's assets was \$2,311,825 (instead of Kaseno's \$4,994,325). Using a 4.44 percent treasury bill rate of return as of August 2003, Golden calculated Ralph's imputed annual income from the net value of his assets was \$102,645 (instead of Kaseno's \$99,800 to \$299,640 per year). Golden recommended the annual imputed income be further reduced to account for Ralph's residence on the Cambria property. To accomplish this, he suggested that \$95,840—apparently representing Ralph's annual debt service costs (i.e., interest payments) for the California Cotton ranch property—be deducted from the \$102,645 imputed income.⁵ Accordingly, Golden reduced Ralph's annual imputed income under *Destein* to \$6,805 (\$567 per month).

Golden also presented an alternate methodology showing Ralph had a negative income, and opined that Ralph was living off of debt financing on his real estate investments, and that because he was "losing money on his investments and living off borrowed funds he ha[d] little or no income available for support."

C. Trial Court's Ruling

The trial court found that Ralph did not make a living in the traditional sense but rather generated wealth by buying and selling real property and making a profit on the appreciation. Under these circumstances, the court concluded it was appropriate to use an alternative method of calculating income available for support. The trial court adopted

⁵ Ralph's income and expense declaration does not list any mortgage interest payments for his residence; thus, it is unclear whether he has a debt service liability for the residence portion of the Cambria ranch property.

the *Destein* methodology, which attributes a rate of return to non-income-producing investment assets.

The court used all of Ralph's expert Golden's recommended asset valuations and imputed income calculations, except for the valuation of the Mesquite property and the deduction of debt service from the imputed income figure. As to the Mesquite property, the court rejected the 2002 \$1.8 million appraisal submitted by Ralph, given that Ralph had bought the property two years earlier for \$5.5 million. The court found it unbelievable that "a piece of property that was purchased for \$5.5 million is now drastically reduced to \$1.8 million." Although noting the unfortunate lack of independent appraisal information in the record, the court was satisfied that it could reasonably set the value of the Mesquite property at the \$5.5 million purchase price recommended by Kaseno.

Reviewing Golden's assets and liabilities schedule, the court ascertained that Golden had effectively valued the Mesquite property at \$4.5 million, because he had included the RC Devco option to repurchase the Mesquite property as a \$2.6 million asset and valued the Mesquite land at \$1.9 million. Accordingly, viewing Golden's Mesquite and RC Devco values together (totaling \$4.5 million), the court then added \$1 million to reach the \$5.5 million purchase price valuation. Thus, although the court valued the Mesquite property at \$5.5 million rather than the \$1.9 million used by Golden, given that Golden also attributed value to the RC Devco option to repurchase the Mesquite property,

the court's calculations, in effect, resulted in a \$1 million (not \$3.6 million) difference in valuation.⁶

Except for this \$1 million adjustment, the court then used the remaining information provided by Golden to ascertain the net value of Ralph's assets. The court determined the net equity in Ralph's assets to be \$4,030,000 (instead of Golden's valuation of \$3,030,000). The court then subtracted \$182,500 for tax consequences and \$535,675 for other liabilities identified by Golden, and calculated that the net value of the assets was \$3,311,825 (instead of Golden's valuation of \$2,311,825). The court applied the treasury bill rate of return recommended by Golden (4.1 percent as of November 20, 2003) to the \$3,311,825 value, thereby imputing \$135,785 gross annual income to Ralph (instead of Golden's valuation of \$102,645.03). The court declined to subtract the annual \$95,840 debt service for the California Cotton ranch property suggested by Golden, thereby rejecting Golden's recommendation that Ralph's imputed annual income under *Destein* was \$6,805. From the \$135,785 annual imputed gross income, the court then subtracted amounts for Ralph's income tax exemptions and \$1,333 for monthly property taxes. Based on these calculations, the court found Ralph's net monthly imputed income to be \$8,843 (\$106,116 annually). After considering Katherine's income and expenses,

⁶ The marked difference between the court's and Golden's final imputed income figures arose not from the court's use of the Mesquite purchase price but from the court's decision not to adopt Golden's debt service reduction for the California Cotton ranch in order to account for Ralph's residence on the Cambria property. In our discussion below we consider the issue of Ralph's residence.

the court ordered guideline support of \$2,485 per month (\$932 and \$1,553 for the two children, respectively).

ANALYSIS

I. *Support Modification Order*

A party seeking modification of a child support order must show changed circumstances justifying the modification. (*In re Marriage of Brinkman* (2003) 111 Cal.App.4th 1281, 1288; *In re Marriage of Shupe* (1983) 139 Cal.App.3d 1026, 1036.) In determining a parent's child support obligation, a court is not limited to a parent's actual income but may also consider the parent's earning capacity. (*In re Marriage of Destein, supra*, 91 Cal.App.4th at p. 1391 (*Destein*).) In appropriate cases, a court may impute income by applying a rate of return to a parent's non-income-producing investment assets. (*Id.* at pp. 1393-1397; see also *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 289-292; *In re Marriage of de Guigne* (2002) 97 Cal.App.4th 1353, 1362.) We review a trial court's decisions modifying support and imputing income under an abuse of discretion standard. (*In re Marriage of Kepley* (1987) 193 Cal.App.3d 946, 951; *Destein, supra*, 91 Cal.App.4th at p. 1393.) We resolve all evidentiary conflicts in favor of the trial court's determination. (*In re Marriage of Kepley, supra*, 193 Cal.App.3d at p. 951.) It is not our role to substitute our judgment for that of the trial court; rather, we determine only if any judge reasonably could have made the order. (*Destein, supra*, 91 Cal.App.4th at p. 1393.)

There is no dispute on appeal that the record shows a change of circumstances allowing modification of the 1995 child support award. The dispute pertains to the

amount of income imputed to Ralph. Ralph argues the trial court abused its discretion because the imputed income figure was based on a speculative assessment of the value of his assets, and in general was drawn from "thin air." He challenges various components underlying the court's calculations, including the court's rejection of the lower valuation in the lender appraisals for the Mesquite property. Although his argument is not entirely clear, he also appears to challenge the fact that the Cambria ranch was valued as an asset even though it includes his residence which is not an investment asset. We conclude the record supports the court's award.⁷

Preliminarily, we are not persuaded by Ralph's assertion that the trial court was required to use the 2002 lender appraisals of \$1.8 or \$1.9 million to value the Mesquite property. In family law proceedings, the value of real property may be established by evidence other than expert appraisal evidence. (*In re Marriage of Folb* (1975) 53 Cal.App.3d 862, 870-871, disapproved on other grounds in *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 749, fn. 5.) The purchase price of real estate is a recognized basis for establishing value as long as it is not too remote in time. (*In re Marriage of Folb*, *supra*, at pp. 867, 871.) Even if the lender appraisal is construed as the equivalent of expert evidence on the value of the property, a trier of fact may reject even uncontradicted expert evidence as long as it does not act arbitrarily. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632-633.)

⁷ Ralph also argues the court improperly relied on his income in January 2002 rather than recognizing that as of March 2002 he no longer was receiving the \$19,334 monthly

Here, it was not unreasonable for the trial court to discredit the lender appraisal, given the sharp difference between the purchase price and the appraisal. The court's conclusion is supported by the fact that the lender appraisal was designed for lending, not sale, purposes. As to the use of the purchase price, the passage of some two years between the purchase and the court's valuation was not so lengthy a period of time as to make reliance on the 2000 purchase price unreliable. We note that Ralph does *not* argue that the trial court abused its discretion in failing to order an *independent* appraisal as suggested by Kaseno. Rather, he confines his complaint to the court's failure to use his own lender appraisal showing a substantially lower value. Although it would have been preferable for independent appraisal information to have been submitted to the court, it was not essential and its absence does not defeat the evidentiary support for the court's ruling.

Turning to the court's methodology as a whole, both Kaseno's and Golden's calculations of the net value of Ralph's assets were based on an assessment of *all* of Ralph's assets and liabilities (including such non-investment assets and liabilities as his car, child support arrears, and accounts payable), not just his *investment* assets and liabilities.⁸ The experts also did not exclude the value of Ralph's home from their asset

option payments. The record does not show that the court based its imputed income calculations on the premise that Ralph was still receiving the option payments.

⁸ Both experts reduced the value of Ralph's assets by \$500,309 for accounts payable and by \$24,488 for unpaid child support.

calculations.⁹ The use of non-investment assets deviates from the *Destein* methodology, which is premised on the theory that income can properly be attributed to non-income-producing *investment* assets because these assets can hypothetically be sold to produce income. (*Destein, supra*, 91 Cal.App.4th at pp. 1390, 1397-1398; see also *In re Marriage of de Guigne, supra*, 97 Cal.App.4th at pp. 1363-1364.) Adhering strictly to the *Destein* approach, non-investment assets such as Ralph's residence and car, as well as non-investment liabilities such as child support arrears and accounts payable, would be excluded from the calculations.

However, Ralph does not argue for reversal on the basis that the court adopted the experts' methodology of assessing the value of all of his assets and his liabilities. As the parties recognized, the court was faced with a case involving complex transactions and disagreement between the two experts as to Ralph's financial status. Given the extent of Ralph's investment assets, the record supports imputation of a substantial amount of income to Ralph. The court used information provided by both experts to reach its own conclusion about the appropriate amount of imputed income, which is a proper approach to judicial fact-finding. (Cf. *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 346-347.) Further, the courts, including the court in

⁹ The expert in *Destein* excluded the value of the payer parent's home when valuing that parent's real estate investments. (*Destein, supra*, 91 Cal.App.4th at p. 1390 and fn. 3.) Rather than follow this approach, Golden recommended deducting the debt service for the California Cotton ranch property from the amount of Ralph's imputed income. Ralph has not presented any argument showing the court abused its discretion in rejecting Golden's suggestion in this regard.

Destein, have emphasized that there is no single methodology appropriate to all cases—rather, the reasonableness of an imputed income calculation depends heavily on the particular facts of the case, and a trial court's selection of a particular methodology should not be upset as long as it is reasonable. (*Destein, supra*, 91 Cal.App.4th at pp. 1396, 1398; *In re Marriage of de Guigne, supra*, 97 Cal.App.4th at p. 1366.)

When rendering its ruling, the court stated the case was extremely difficult given the nature of Ralph's business affairs, but that it wanted to reach a decision that was accurate for both sides, so that Ralph could afford to pay the child support and so that the children would receive the support to which they are entitled. Particularly given the complexity of Ralph's financial transactions, we see no abuse of discretion in the court's reliance on the experts' methodology. The methodology which included Ralph's residence in the valuation of his assets is balanced by its concomitant inclusion of non-investment related liabilities. Under these circumstances, and given that Ralph has not argued for reversal on this basis, we are satisfied the final child support award was reasonable and reversal of the judgment is not warranted.¹⁰

II. *Driver's License*

With no supporting legal argument, Ralph argues the trial court should have released his driver's license, which apparently had been suspended for failure to pay child support. The record shows that after a discussion between the court and parties, Ralph's

¹⁰ Katherine, representing herself on appeal, argues that the trial court's findings undervalued Ralph's assets and the child support award is too low. Katherine has not

counsel expressly withdrew the request to have the court resolve the license issue. Under these circumstances, we deem the issue waived on appeal. (*In re Mark C.* (1992) 7 Cal.App.4th 433, 446.)

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.

filed a cross-appeal; accordingly, we have no jurisdiction to reach this issue. (*In re Marriage of Shupe, supra*, 139 Cal.App.3d at p. 1036.)